No. 13-15292

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLA ROSENFIELD,

PLAINTIFF-APPELLANT,

v.

GLOBALTRANZ ENTERPRISES, INC.,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court for the District of Arizona,
Honorable Neil V. Wake, Judge, Case No. 2:11-cv-02327-NVW

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of the employee, Alla Rosenfield, in this Fair Labor Standards Act ("FLSA" or "the Act") anti-retaliation case.

STATEMENT OF INTEREST

The Secretary has a substantial interest in the proper construction of section 15(a)(3) because he administers and enforces the FLSA. *See* 29 U.S.C. 204,

211(a), 216(c), 217. The EEOC is responsible for enforcing the Equal Pay Act of 1963, 29 U.S.C. 206(d), which is codified as part of the FLSA and is covered by the same anti-retaliation provision. Section 15(a)(3) is central to achieving FLSA compliance. *See Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). If the district court's decision is affirmed, the intended scope and purpose of the FLSA's anti-retaliation protection would be unduly narrowed.

ISSUE

Whether the phrase "filed any complaint," as used in the anti-retaliation provision of the FLSA, 29 U.S.C. 215(a)(3), encompasses reports by a managerial employee to other managers and company executives that the company is not in compliance with the minimum wage and overtime compensation requirements of the Act.

STATEMENT

1. The employee, Alla Rosenfield, was hired in April 2010 to serve as the Manager of Human Resources for the employer GlobalTranz. Rosenfield's Statement of Facts ("SOF") ¶ 1, Excerpts of Record ("ER") 102-18. By January 2011, GlobalTranz had promoted Rosenfield twice, and she was serving as Director of Human Resources and Corporate Training. SOF ¶ 3.

During the course of Rosenfield's employment, she came to believe that GlobalTranz was misclassifying approximately forty to fifty employees, thereby

depriving them of the overtime compensation protection of the Act. SOF ¶ 5. Beginning around May 2010 and ending on May 31, 2011, Rosenfield reported to GlobalTranz supervisory management executives about the foregoing alleged FLSA violations. *Id*. ¶ 9. In total, Rosenfield had eight separate explicit conversations with GlobalTranz management about these alleged FLSA violations. *Id*. ¶ 10. Five days following Rosenfield's most recent conversation about FLSA violations, she was terminated. *Id.*

2. Rosenfield filed a complaint in the District Court for the District of Arizona alleging, among other things, that her employment was terminated in retaliation for engaging in protected activity under the FLSA's anti-retaliation provision. Am. Cmplt., ER 334-50. GlobalTranz moved for partial summary judgment on Rosenfield's FLSA retaliation claim, arguing that Rosenfield had not demonstrated that she engaged in statutorily-protected activity. Def. Mtn. Summ. J., ER 151-68.

3. The district court ruled in favor of the employer's summary judgment motion. Order, Nov. 7, 2012, ER 7-9. Despite the fact that Rosenfield had "advocated consistently and vigorously on behalf of Defendant GlobalTranz's employees whose FLSA rights Plaintiff thought were being violated[,]" the district court concluded that she "did not do so by stepping out of her role as a manager" and as such was not entitled to the protections of the Act's anti-

retaliation provision. ER 8-9. Relying on case law from other circuits that predated the Supreme Court's decision in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011), the court stated that all of Rosenfield's alleged protected activity, "including her oral reports to her supervisor regarding GlobalTranz's failure to comply with FLSA standards, fell within the ambit of her managerial duties." ER 8-9. Although the court found that Rosenfield opposed GlobalTranz's policies with regard to the classification of employees for FLSA purposes, and sought to change those policies, she did so, the court concluded, without taking a position adverse to GlobalTranz. *Id.* Therefore, the court granted GlobalTranz's motion for partial summary judgment. This appeal followed. ER 10-11.[1]

ARGUMENT

THE FLSA'S ANTI-RETALIATION PROVISION PROTECTS "ANY EMPLOYEE" WHO MAKES A COMPLAINT THAT MEETS THE REQUIREMENTS SET FORTH BY THE SUPREME COURT IN *KASTEN*

Section 15(a)(3) of the FLSA provides, in relevant part, that "it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted

[1] By order dated April 8, 2015, this Court requested the views of the Secretary and the EEOC. Order, Apr. 8, 2015, Dkt. No. 29.

or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding." 29 U.S.C. 215(a)(3). The Act broadly defines "employee" as "any individual employed by an employer" and "employ" as including "to suffer or permit to work." 29 U.S.C. 203(e)(1), (g).

Despite section 15(a)(3)'s expansive statutory language and broad remedial purpose, several courts of appeals have required managerial employees to meet additional requirements in order to come within the Act's anti-retaliation protections. *See, e.g., McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996). There is, however, no justification to be found either in the plain language of the statute or in the underlying purposes of Act not to provide protection to any employee who files a complaint asserting statutory rights. Rather, section 15(a)(3) protects all employees regardless of job duties or job title.

Thus, the phrase "filed any complaint" must include complaints by managers, even when those complaints happen to overlap with the manager's job duties, provided the complaint meets all of the relevant requirements outlined in *Kasten*.

A. Section 15(a)(3) of the FLSA Protects "Any Employee" from Retaliation, Including Managerial Employees.

1. When interpreting a statute, a court begins with the plain language. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Because section 15(a)(3) prohibits retaliation against "any employee" who has filed "any complaint," it necessarily affords protection for all employees, regardless of job duties or job titles. Indeed, nothing in the FLSA or the legislative history suggests that managerial employees must clear additional hurdles in order to receive the provision's protection. Such a reading would read words into the provision that simply do not exist. Therefore, the broad phrase "any employee" refutes a construction of section 15(a)(3) that would limit the anti-retaliation provision to non-managerial employees or require managerial employees to meet additional requirements not enumerated in the statute itself. Additionally, Congress has excluded classes of employees from the Act expressly when it has so chosen—for example, various categories of employees are exempted from the Act's minimum wage and overtime compensation provisions. *See, e.g.*, 29 U.S.C. 213(a). There is, however, no such limitation on its anti-retaliation provision; rather, its language is exceedingly broad and does not distinguish the complaints (as broadly defined by Supreme Court precedent) of managerial employees from the complaints of other employees. The plain language of the provision thus strongly supports the conclusion that managerial employees should receive the same protection from

retaliation under section 15(a)(3) as any other employee, without having to "step outside" their usual employment role to invoke the statute's protections.

2. Giving the text its natural reading accords with the objectives underlying the FLSA in general and its anti-retaliation provision in particular. As repeatedly recognized by the Supreme Court, the FLSA is a remedial statute, designed to grant individual plaintiffs broad access to the courts. *See, e.g., Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739-40 (1981). Accordingly, courts have "consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (internal quotation marks and citation omitted). Notably, this Court has affirmed an expansive interpretation of the anti-retaliation provision. *See Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc) ("[N]arrow construction of the anti-retaliation provision could create an atmosphere of intimidation and defeat the Act's purpose."). Moreover, the "object and policy" of a statute are relevant to determining its meaning. *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks and citation omitted). The anti-retaliation provision is central to the FLSA's statutory scheme, which Congress intended to function not through close federal oversight, but through "information and complaints received from

employees" about their employers' non-compliance. *See Robert DeMario Jewelry*, 361 U.S. at 292.

3. In 1996, the Tenth Circuit created the so-called "manager rule," which set forth additional requirements that must be met in order for managerial employees to be eligible for the protection of the Act's anti-retaliation provision: such employees must "step outside" their role as manager, and must assume a position adverse to the employer. *McKenzie*, 94 F.3d at 1486. In *McKenzie*, a personnel director told the president of the company that the company was not complying with the FLSA's overtime compensation requirements; the personnel director was terminated approximately sixteen days later. *Id.* at 1481. The Tenth Circuit explained that in order to engage in protected activity under section 15(a)(3), "the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer, actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA." *Id.* at 1486-87. The court continued, stating that "it is the assertion of statutory rights (*i.e.*, the *advocacy* of rights) by taking some action adverse to the company—whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise—that is the hallmark of protected activity under § 215(a)(3)." *Id.* at 1486 (emphasis in

original). Other circuits have since endorsed the "manager rule." *See, e.g.*, *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102-03 (1st Cir. 2004); *Hagan v. Echostar Satellite*, L.L.C., 529 F.3d 617, 625 (5th Cir. 2008); *Pettit v. Steppingstone, Ctr. for the Potentially Gifted*, 429 F. App'x 524, 530 (6th Cir. 2011) (unpublished).[2]

4. The manager rule, as enunciated in these cases, places burdens on managerial employees that are not supported by the plain text or purpose of the anti-retaliation provision. The Secretary and the EEOC are not suggesting, however, that in each of the cases that has applied the manager rule, the plaintiff had necessarily engaged in protected activity. Rather, the concern is that courts have placed additional, unwarranted burdens on these plaintiffs solely because of

[2] Courts have also imported the rule into Title VII jurisprudence, despite Title VII's even broader language, which includes an "opposition" clause. *See, e.g.*, *EEOC v. HBE Corp*., 135 F.3d 543, 554 (8th Cir. 1998) (concluding that "[a] requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a discriminatory policy," rather than "merely alert[ing] management of potential violations of the law in order to avoid liability for the company"); *see also Brush v. Sears Holdings Corp*., 466 F. App'x 781, 787 (11th Cir. 2012) (unpublished) (concluding that a manager's complaint to her employer concerning how a rape investigation was handled was not protected activity because the plaintiff's "job responsibilities involved exactly the type of actions that [the plaintiff] took on Mrs. Doe's behalf"); *but see Smith v. Sec'y of Navy*, 659 F.2d 1113, 1121 (D.C. Cir. 1981) (concluding that an EEO counselor had engaged in protected activity even though such activity was also part of the plaintiff's job duties, and noting that "[i]t is the explicit function of EEO officers to 'assist' in 'investigation(s)' and 'proceeding(s)' under Title VII, and it is for work of this kind that Smith was penalized").

their job duties or job title.

The question whether a plaintiff who happens to be a manager has engaged in protected activity under section 15(a)(3) should be evaluated based upon the same, well-established criteria for making that determination that are used for any other employee. The Supreme Court's 2011 decision in *Kasten* provides the framework for such an evaluation. *See* 131 S. Ct. at 1325. In determining that oral complaints under the FLSA's anti-retaliation provision are protected, the Court in *Kasten* stated that "the phrase 'filed any complaint' contemplates some degree of formality," because such formality is necessary to give an employer "fair notice" that a complaint about a violation of the Act is being asserted. *Id*. at 1334. The Court specifically stated that to fall within the scope of the anti-retaliation provision, "a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Id.* at 1335.

Applying that framework to this case, a report by a managerial employee that the company may not be in compliance with the FLSA can fall within section 15(a)(3)'s protections, so long as the employer would reasonably understand the report "as an assertion of rights protected by the statute and a call for their protection." *Kasten*, 131 S. Ct. at 1335. Additionally, this inquiry turns on "both [the] content and context" of the complaint, which may well include the

employee's title, job description and responsibilities, the circumstances surrounding the report, and other relevant factors. An employee's job duties and title, however, are not dispositive; thus, an employee need not "step outside" his or her role in order to engage in protected activity.

5. The manager rule cases such as *McKenzie*, *Claudio-Gotay*, and *Hagan* all pre-date *Kasten*, and as such the courts deciding those cases did not have the benefit of the framework set forth by the Supreme Court.[3] Moreover, none of the courts of appeals that have adopted the manager rule have acknowledged the relevant congressional objectives or attempted to reconcile the rule with the statutory text. They have instead adopted the rule to mitigate perceived policy problems. The policy concerns cited by these courts in support of the manager rule—that all activity of certain employees would be protected, or that employers will be unable to terminate managers—are largely obviated by *Kasten's* clear enunciation of a notice requirement.

Kasten, in discussing that the employer must receive fair notice of an employee's complaint, noted that one policy consideration in interpreting the anti-retaliation language is whether it promotes fairness to employers. *See* 131 S. Ct. at 1334 ("The Act also seeks to establish an enforcement system that is fair to

[3] There are several unpublished decisions that post-date *Kasten*. *See, e.g., Lasater v. Tex. A & M Univ.-Commerce*, 495 F. App'x 458 (5th Cir. 2012).

employers."). Thus, employees, including managers, only engage in protected activity when the employer has been given "fair notice" that there has been as "assertion of [protected] rights" and a call for protection. *Id*. at 1335. Each alleged complaint should be analyzed to ensure that it provides "sufficiently clear and detailed" notice to an employer that rights under the FLSA have been asserted in order for a plaintiff's complaint to be protected. *Id.* This analysis should not be altered because the employee at issue is a manager; rather, the protected activity issue turns on whether a managerial employee has filed a sufficient complaint by notifying his or her superiors of FLSA violations in the same manner as any other employee.

As such, rejecting the manager rule will not result in a flood of litigation or place employers in an untenable positon. A broad remedial reading of the anti-retaliation provision to include all employees, including managers, does not convert every action of a managerial employee into protected activity. As noted, such employees must still comply with the same requirements as any other employee for engaging in protected activity—fair notice and a sufficiently clear and detailed complaint. *See Kasten*, 131 S. Ct at 1334-35. Moreover, managerial employees, and human resources managers in particular, should not receive any sort of heightened protection due to the fact that their work routinely touches upon compliance with the FLSA. *See, e.g., Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075,

1082 (9th Cir. 1996) (explaining that "an employee does not receive special protection under Title VII simply because the employee handles discrimination complaints or works on affirmative action matters") (internal quotation marks and citations omitted).

6. Furthermore, the establishment of protected activity is, of course, only the first step of several a plaintiff must successfully take in order to prevail on a retaliation claim. The employer will always have the opportunity to proffer a legitimate, non-retaliatory reason for termination. Thus, rejecting the manager rule in the FLSA anti-retaliation context does not impose on an employer any additional barriers to terminating a manager for legitimate reasons. Much like GlobalTranz, the employer in *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159 (9th Cir. 1984), a Ninth Circuit retaliation case discussed *infra*, argued that protecting the complainant in that case would require companies to "retain abrasive, insolent, and arrogant quality control inspectors if [such employees] comply technically with the requirements of the job." 735 F.2d at 1163 (internal quotation marks omitted). This Court, however, rejected that contention, stating that employers were simply forbidden from discriminating "based on competent and aggressive inspection work. In other words, contractors regulated by [the Energy Reorganization Act ("ERA")] may not discharge quality control inspectors because they do their jobs too well." *Id.*; *see Nelson*, 83 F.3d at 1082 (explaining

that employers are not prevented from "dismissing an employee who handles discrimination complaints as part of his job when the employee handles these complaints contrary to the instructions of his employer") (internal quotation marks and citation omitted).

There are thus established standards for determining both protected activity and retaliation that apply to all employees. The Secretary and the EEOC are simply maintaining here that additional standards should not be added because of an employee's job duties or job title.

B. This Court's Precedent Supports Protecting Managerial Employees from Retaliation.

1. While this Court has not directly opined on the issue in this case, its long-standing precedent is in tension with the manager rule. This Court has repeatedly embraced the broad remedial purpose of the FLSA, and has recognized the critical role that section 15(a)(3) plays in the workplace. In this regard, this Court has stated that the purposes of the anti-retaliation provision are: "(1) to provide an incentive for employees to report wage and hour violations [committed] by their employers; (2) to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance; and (3) to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act." *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000) (internal quotation marks and citations omitted).

In *Lambert*, a case in which the Department and the EEOC each participated as amicus, this Court concluded that "[b]ased on the guiding purpose and design of the FLSA and the language of the statute," internal complaints made to employers are within the ambit of the FLSA's anti-retaliation clause. 180 F.3d at 1001. In addressing whether internal complaints should be protected, this Court recognized that excluding such complaints would

> leave employees completely unprotected by the FLSA against retaliatory discharge when they complain to their employers about violations of the Act—exactly what the anti-retaliation provision was designed to prevent. We hold, therefore, that in order for the anti-retaliation provision to ensure that 'fear of economic retaliation' not 'operate to induce aggrieved employees quietly to accept substandard conditions,' it must protect employees who complain about violations to their employers, as well as employees who turn to the Labor Department or the courts for a remedy.

Id. at 1004 (quoting *Robert DeMario Jewelry*, 361 U.S. at 292). Similarly, in this case, adoption of the manager rule would leave certain employees unprotected by the FLSA against retaliatory discharge. Indeed, some courts that have applied this rule have acknowledged that this is how the manager rule operates in terms of the consequences that flow from it. *See, e.g., Brush v. Sears Holdings Corp.*, 466 F. App'x 781, 787 (11th Cir. 2012) (unpublished) (stating that "we find the 'manager

rule' persuasive and a viable *prohibition against certain individuals recovering* under Title VII") (emphasis added).[4]

2. Furthermore, this Court has concluded in the context of a similar statute that an employee's job duties or title should not remove that employee from the protection of an anti-retaliation provision, essentially rejecting the "step outside" requirement of the manager rule. In *Mackowiak*, this Court held that a similar anti-retaliation provision of the ERA extended protection to a quality control inspector who had complained about safety and quality, a core part of his job duties. *See* 735 F.2d at 1163.[5] This Court stated that employers are prohibited from discrimination "based on [an employee's] competent and aggressive inspection work. In other words, contractors regulated by [the ERA's anti-retaliation provision] may not discharge quality control inspectors because they do their jobs too well." *Id.*

[4] *See, e.g., Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986) (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the other").

[5] The ERA provision applied when an employee: (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to participate in any manner in such a proceeding. *See* 42 U.S.C. 5851(a).

Significantly, this Court in *Lambert* relied upon *Mackowiak*, noting that the ERA has the same broad, remedial purpose of protecting workers from retaliation as the FLSA. *See Lambert*, 180 F.3d at 1005 n.3 (explaining that the anti-retaliation provisions of the FLSA and the safety and environmental statutes have analogous purposes, and noting that the goal of an environmental whistleblower statute, for example, is not necessarily a more important or more pressing objective than ensuring that workers receive the minimum wage the law guarantees). Thus, this Court held in *Mackowiak* that an employee could engage in protected activity under the ERA while performing his job duties, and subsequently held in *Lambert* that the anti-retaliation provisions of the ERA and the FLSA are analogous and have the same remedial purpose. It follows that in this case, where there is evidence to suggest that Rosenfield was terminated for doing her job "too well," she should not be precluded from pursuing her retaliation claim simply because her complaints happened to also be related to her job duties. As Human Resources Director, Rosenfield repeatedly and vigorously complained to her superiors about specific FLSA violations concerning forty to fifty employees, and was terminated shortly thereafter—a fact pattern similar to *Mackowiak* and surely within the broad scope of protection afforded by the FLSA's anti-retaliation provision as described by this Court in *Lambert*.

3. Additionally, in *Smith v. Singer Co.*, 650 F.2d 214, 217 (9th Cir. 1981), this Court upheld the termination of an employee who had "placed himself in a position squarely adverse to his company." The plaintiff in *Smith*, an employee in charge of developing an affirmative action program for his employer, denied that he had been filing external complaints of discriminatory practices against his employer when in fact he had been. This Court concluded that the plaintiff was incapable of performing his job duties in view of the adversarial position in which he placed himself with his employer. *Id.* at 216. This conclusion is in tension with the manager rule's requirement that a manager take a position adverse to the company in order to receive the protection of the Act. Thus, in *Smith*, the adversarial relationship created by the plaintiff seemed to place the plaintiff outside of Title VII's protection, yet under the manager rule courts have required that plaintiffs assume a position adverse to the employer in order to be protected.

C. Limiting the Ability of Managerial Employees to Bring Retaliation Claims Would Undermine FLSA and Equal Pay Act Enforcement.

1. The Supreme Court has recognized that the Act's anti-retaliation provision is critical to ensuring effective compliance with the substantive provisions of the FLSA. *See Robert DeMario Jewelry*, 361 U.S. at 292. Compliance with the FLSA depends on employees providing information about violations of the statute without fear of retaliation. "Congress did not seek to secure compliance with prescribed standards through continuing detailed federal

supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Id.* "By the proscription of retaliatory acts set forth in § 15(a)(3), . . . Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Id.*

2. If allowed to stand, the district court's decision applying the manager rule would undermine enforcement of the FLSA by strongly discouraging managerial employees from approaching their employers with information about violations of the Act, because in so doing they would often be left unprotected. The Secretary relies heavily on private actions under the FLSA pursuant to section 16(b), 29 U.S.C. 216(b) (as does the EEOC under the Equal Pay Act); indeed, the Secretary's own enforcement actions constitute a small percentage of FLSA lawsuits.[6] The Department's Wage and Hour Division has only approximately 1,000 investigators charged with enforcing the FLSA's protections in over seven million workplaces. *See, e.g.,* Testimony of Nancy J. Leppink, Deputy Wage & Hour Adm'r, Wage & Hour Div., U.S. Dep't of Labor, Before the Subcomm. on

[6] According to the Administrative Office of the U.S. Courts, there were 8,204 FLSA lawsuits commenced in the federal courts during the twelve-month period ending June 30, 2014. Of those lawsuits, the Department filed 191. *See* Statistical Tables for the Federal Judiciary, Table C-2 (2014), at 3, *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2014/june/C02Jun14.pdf.

Workforce Protections of the House Comm. on Educ. and the Workforce (Nov. 3, 2011), *available at* http://www.dol.gov/_sec/media/congress/20111103_Leppink.htm.

3. Making it more difficult for human resources managers to avail themselves of the protection of section 15(a)(3) will frustrate Congress's intent in enacting this provision by discouraging an entire class of employees from reporting FLSA violations. These employees, of course, are often best situated to identify and complain about such violations, yet it is these very employees' complaints about FLSA violations that would be chilled by application of the manager rule. The manager rule also leaves employees responsible for monitoring FLSA violations vulnerable no matter what they choose to do: if they address the violations, an employer can fire them for doing their job "too well," but if they do not address the violations, the employer can fire them for failing to do their assigned jobs.

D. The Secretary's and the EEOC's Longstanding Interpretation of the Anti-Retaliation Provision Supports Protecting Bona Fide Manager Complaints.

1. The Department has extensive experience administering section 15(a)(3) under the FLSA, as does the EEOC under the Equal Pay Act, and both have consistently interpreted that section broadly and rejected attempts to narrow its scope because this interpretation best serves the remedial purpose of the FLSA by

protecting *all* employees from retaliation for asserting FLSA rights.[7] Concerning the manager rule specifically, in *Kilpatrick v. Serv. Merch. Co., Inc.*, appeal dismissed, No. 98-31423 (5th Cir. Jan. 27, 2003), a case involving a store manager's complaints about FLSA violations to his superiors, the Department stated in its amicus brief that it disagreed with *McKenzie*

> to the extent that it construe[d] protected activity under Section 15(a)(3) not to include a complaint by an employee responsible for ensuring compliance with the FLSA unless the employee steps outside her role of representing the company. Such activity is protected, although an employer who does not know that the employee is "asserting a right adverse to the company," [*McKenzie*,] 94 F.3d at 1486, will lack the retaliatory intent necessary to establish a FLSA violation.

[7] The Department and the EEOC have repeatedly argued in amicus briefs for a broad and unfettered application of the provision. *See, e.g.*, Br. for the United States as *Amicus Curiae* Supporting Pet'r, *Kasten*, 131 S. Ct. 1325 (2011) (No. 09-834), 2010 WL 3007906 (oral complaints); Br. for the Acting Sec'y of Labor as *Amicus Curiae* Supporting Pl.-Appellant, *Greathouse v. JHS Sec., Inc.*, No. 12-4521 (2d Cir. filed Feb. 26, 2013), 2013 WL 871205, and Br. for the EEOC as *Amicus Curiae* (ECF No. 58) (internal complaints); Br. for the Sec'y of Labor and EEOC as *Amici Curiae* in Supp. of Pl.-Appellant, *Dellinger v. Science App. Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011) (No. 09-4088), 2011 WL 4006536 (prospective employees); Br. for the Sec'y of Labor as *Amicus Curiae* in Supp. of Pl.-Appellant, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009) (No. 08-2820), 2008 WL 5786344 (internal and oral complaints); Br. for the Sec'y of Labor and the EEOC as *Amici Curiae* in Supp. of Pl.-Appellant Pet. for Panel Reh'g and Reh'g *En Banc*, *Kasten v. Saint Gobain Performance Plastics Corp.*, 585 F.3d 310 (7th Cir. 2009) (No. 08-2820) (ECF No. 33) (internal and oral complaints); Br. for the EEOC as *Amicus Curiae* in Supp. of Pl. (ECF No. 57), and Br. for the Sec'y of Labor as *Amicus Curiae* in Supp. of Pet. for Reh'g, *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999) (Nos. 96-36017, 96-36266, and 96-36267) (ECF No. 81) (internal and oral complaints).

Br. for the Sec'y of Labor as *Amicus Curiae* Supporting Appellant in Part, *Kilpatrick, supra*, No. 98-31423 (5th Cir. filed Apr. 22, 1999), 1999 WL 33729234, at *22 n.6.[8]

Additionally, in its sub-regulatory guidance, the Department has emphasized the broad statutory language of the anti-retaliation provision. *See, e.g.*, U.S. Dep't of Labor. Wage & Hour Div., Fact Sheet # 77A: Prohibiting Retaliation Under the Fair Labor Standards Act (Dec. 2011), *available at* http://www.dol.gov/whd/regs/compliance/whdfs77a.htm ("Because section 15(a)(3) prohibits 'any person' from retaliating against 'any employee' the protection applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA."). Further, the Department has focused on and increased its enforcement of section 15(a)(3) claims in recent years. *See, e.g.*, U.S. Dep't of Labor, Wage & Hour Div., Press Release No. 14-344-DAL, "US Department of Labor cracks down on worker retaliation in Southwest, says unlawful acts against workers exercising their rights will not be tolerated" (Mar. 20, 2014), *available at*

[8] Although the Secretary filed an amicus brief in *Kilpatrick*, the Fifth Circuit did not issue a decision; rather, the court dismissed the case due to intervening proceedings in U.S. Bankruptcy Court involving the defendant Service Merchandise.

http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20140320.xml (noting that the "Wage and Hour Division has increased its focus on identifying and resolving instances of employer retaliation against workers").[9]

2. Thus, the Secretary's and the EEOC's position here is entirely consistent with their longstanding broad interpretation of the anti-retaliation provision, the Secretary's and the EEOC's amicus position in *Kasten* to the extent that that brief advocated a broad and inclusive reading of the provision, and the Secretary's amicus position in *Kilpatrick*.[10] *See* 131 S. Ct. at 1335 ("[G]iven Congress'

[9] Significantly, in retaliation cases involving other statutes administered by the Secretary that contain provisions similar to the FLSA's anti-retaliation provision, such as the Sarbanes-Oxley Act ("SOX") and the environmental and safety whistleblower statutes, the Administrative Review Board has explicitly and repeatedly held that protected activity may encompass the performance of one's job duties. The Board explained that SOX "does not indicate that an employee's report or complaint about a potential violation must involve actions outside the complainant's assigned duties. We therefore conclude that Robinson's 2001 complaint about the bankruptcy charge-off problem constituted SOX-protected activity." *Robinson v. Morgan Stanley*, ARB No. 07-070, slip op. at 13-14, 2010 WL 743929 (ARB Jan. 10, 2010); *see Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, 2014 WL 1758318, at *8 (ARB Apr. 25, 2014); *Warren v. Custom Organics*, ARB No. 10-092, 2012 WL 694499, at *6 (ARB Feb. 29, 2012); *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, 2010 WL 3031377, at *6 (ARB July 27, 2010). And, as discussed *supra*, in *Mackowiak*, 735 F.2d at 1163, this Court held that performance of one's job duties could constitute protected activity under the whistleblower provision of the ERA, which the Secretary also administers.

[10] The EEOC has also briefed this issue as it pertains to Title VII's anti-retaliation provision, arguing, among other things, that "Title VII's plain language and the breadth with which the retaliation provisions should be applied are incompatible

delegation of enforcement powers to federal administrative agencies, we also give a degree of weight to [DOL's and the EEOC's] views about the meaning of this enforcement language."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[11]

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with carving out a 'step outside' requirement for those employees who work as part of the employer's compliance machinery." Br. for the EEOC as *Amicus Curiae* in Supp. of Appellant at 21, *DeMasters v. Carilion Clinic*, No. 13-2278 (4th Cir. filed Feb. 25, 2014) (ECF No. 21). Moreover, the EEOC's Compliance Manual section on retaliation, promulgated in 1998, states that:

> The anti-retaliation provision of the Fair Labor Standards Act, which applies to the Equal Pay Act, does not contain a specific "opposition" clause. However, courts have recognized that the statute prohibits retaliation based on opposition to allegedly unlawful practices. *See, e.g., EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989-90 (6th Cir. 1992); *EEOC v. White & Son Enterprises*, 881 F.2d 1006, 1011 (11th Cir. 1989). *Contra Lambert v. Genessee Hospital*, 10 F.3d 46, 55 (2d Cir. 1993), cert. denied, 511 U.S. 1052 (1994).

2 EEOC Compl. Man., *Section 8, Retaliation*, § 8-II(B) at 8-3 n.12 (May 20, 1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf.

[11] Should this Court be inclined to adopt some version of the manager rule, the Secretary urges that the rule be adopted in a narrow, limited manner in view of the plain language of the provision, the clear legislative intent of the Act, the underlying policies of the FLSA's anti-retaliation provision, and the Department's consistently broad interpretation and enforcement of section 15(a)(3). A limited application of the rule would also be more consistent with the Supreme Court's recent guidance in *Kasten* as well as Ninth Circuit precedent concerning workplace retaliation.

Thus, where, as here, an employee makes a very specific, definite complaint, alleging in detail FLSA non-compliance (misclassification of hourly employees entitled to overtime compensation) and identifying the affected employees (forty-fifty customer sales representatives), the employee has likely "stepped outside" her role. Indeed, Rosenfield was doing much more than merely providing reports on

CONCLUSION

For the foregoing reasons, the Secretary and the EEOC request that this Court hold that the district court erred when it applied the manager rule to complaints made pursuant to section 15(a)(3) of the FLSA by a human resources manager.

Respectfully submitted,

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FLSA requirements; she was, in the words of the district court, "advocat[ing] consistently and vigorously on behalf of Defendant GlobalTranz's employees whose FLSA rights Plaintiff thought were being violated." Order, Nov. 7, 2012, Dkt. No. 84 at 3. Such a finding should support a conclusion that a plaintiff engaged in protected activity under any circumstances.

FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-2 FOR CASE NUMBER 13-15292 AND VIRUS CHECK

I certify that the foregoing brief is accompanied by a motion for leave to file an oversize brief pursuant to Ninth Circuit Rule 32-2 and is 5,975 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief was prepared using Microsoft Office Word, 2003 edition.

I further certify that a virus scan was performed on the Brief using McAfee, and that no viruses were detected.

Dated: June 15, 2015

/s/ Melissa A. Murphy
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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 15th day of June, 2015, a copy of the BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT was filed electronically through the Court's CM/ECF system (via the Clerk's office). I further certify that upon receipt of a directive, I will serve seven (7) copies of this Brief in paper format to the Clerk of this Court by express mail. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 15, 2015

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